

MOUNTAIN VALLEY LUMBER, INC.,)	AGBCA No. 2003-171-1
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Appellant)	
)	
Representing the Appellant:)	
)	
Alan I. Saltman, Esquire)	
Richard W. Goeken)	
Saltman & Stevens, P.C.)	
1801 K Street, N.W.)	
Suite M-110)	
Washington, DC 20006)	
)	
Representing the Government:)	
)	
Kenneth S. Capps, Esquire)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
P. O. Box 25005)	
Denver, Colorado 80225-0005)	

RULING ON MOTIONS FOR SANCTIONS

July 18, 2006

BEFORE POLLACK, Administrative Judge.

Opinion for the Board by Administrative Judge POLLACK.

The Appellant has filed a Motion for Sanctions, where it has asked the Board to draw adverse factual inferences on certain matters against the Forest Service (FS), due to the failure/refusal of the FS to produce relevant documents sought in discovery. The documents in issue are in the possession of the Department of Justice (DOJ), which has refused to honor a Board subpoena or assist the Board in enforcement at the district court, as set out in Section 11 of the Contract Disputes Act (CDA). The Motion requires me to address the scope and meaning of Section 11 of the CDA, dealing with the Board subpoena power over the FS and DOJ and also brings into consideration, how one is to read Section 11 in light of the language in Section 8 of the CDA authorizing the boards to grant any

relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims. The ultimate questions before me are whether the actions of DOJ/FS justify the imposition of sanctions and, if so, what sanctions are warranted.

Section 11 provides:

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application by the board of contract appeals through the Attorney General . . . shall have jurisdiction to issue the person an order requiring him to appear before the agency board or member thereof, to produce evidence or to give testimony or both. . . .

Section 8 provides in pertinent part:

In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

I will not here recount in detail the history of the discovery disputes on this appeal. Much of the history has been addressed in a Ruling dated June 30, 2005, issued by retired Judge Anne Westbrook and Rulings dated January 12 and January 13, 2006, issued by the current presiding judge. With history laid out elsewhere, I focus on subsequent actions which have led up to the current motion by Appellant.

The instant discovery dispute concerns documents which were reportedly generated by DOJ, during the time that DOJ was acting as the FS attorney in environmental litigation in Heartwood v. United States Forest Service, 73 F. Supp. 2d 962 (S.D. Ill. 1999), aff'd 230 F.3d 947 (7th Cir. 2000). Both DOJ and the FS have claimed the documents in dispute would be subject to privilege, however, neither the FS nor DOJ has produced the documents for Board review nor have either provided a privilege log identifying the documents. The FS has contended that it is powerless to act, as the documents are in the custody and control of DOJ. DOJ has taken the express position, that “. . . when Congress passed the Contract Disputes Act in 1978, it acted subject to a well-known interpretive presumption that the federal government is excluded from the reach of statutes like 41 U.S.C. §610, that operate only with respect to a person.” Put another way, DOJ is saying that the CDA does not provide the board with authority or a mechanism to enforce its subpoena against a federal entity or compel a federal entity to provide documents. Apparently, DOJ reads the CDA to provide enforcement only as regards private parties and litigants.

As I discuss in more detail below, I issued a subpoena to DOJ for production of documents at the request of Appellant. DOJ refused to honor the subpoena. When I then, on behalf of the Board, attempted to pursue the procedure set out in Section 11 of the CDA for enforcement of subpoenas, DOJ refused (through the U.S. Attorney for the District of Columbia on behalf of himself and on behalf of the Attorney General of the United States) to proceed or participate in the enforcement process set out in Section 11. Section 11 requires that an application for enforcement by the Court is to be handled through DOJ. The Board is not authorized to make the application on its own. In a letter to the Board, DOJ contended that the enforcement provisions of Section 11 of the CDA do not apply to DOJ or to the federal government. Additionally, DOJ continues to claim that under Touhy v. Ragen, 340 U.S. 462 (1951), it has the authority to withhold the documents and not provide a log. Touhy is also discussed below.

Discovery is at an impasse as to the documents. Appellant has filed a motion for sanctions. The FS supports DOJ, and argues that absent the Board finding the U.S. government to be the party, rather than the FS, the Board has authority only over FS actions. The FS characterizes itself as an innocent bystander, arguing that since it cannot control or force DOJ to release the documents or to provide a log, any sanctions against the FS, because of failure of DOJ to produce the documents, would be inappropriate and unwarranted.

FACTS SINCE RULING

On January 13, 2006, I issued a ruling on motions of the FS and Appellant for Reconsideration of the Board Ruling of June 30, 2005 (issued by Judge Westbrook). In issuing the ruling, I summarized what I saw as the position of DOJ, and stated:

[In] several places in its briefing, DOJ has asserted that the proper and required procedure for seeking documents from an agency not a party to the contract is through the Board subpoena process. DOJ contends that what DOJ objects to is the proposition that a party such as Appellant can make a single discovery request to a contracting entity such as USDA and that request would be binding on government agency [sic] not a party to the contract. DOJ reads Judge Westbrook's Ruling in MVL to portend that this Board sees the United States of America, including all federal agencies, as the "party" to this contract dispute and does not give due weight to the fact that this dispute arises out of a contract between Appellant and a single agency, USDA.

DOJ appears to acknowledge that Appellant had a right to seek discovery of documents from it and the CEQ (subject to normal protections) but here takes the position that such right requires Appellant to present a subpoena to DOJ or CEQ and not to the FS. The FS agrees with the position of DOJ.

Given what appeared to be DOJ acknowledging the power of the Board to subpoena documents from it (as long as the subpoena was issued to DOJ), I took what I considered to be a practical approach

to move the discovery dispute and appeal forward, and issued a subpoena directly to DOJ. That was in lieu of arguing over what appeared then to be an essentially academic question, as to whether the United States was a party or whether the party to the contract was solely the FS or Department of Agriculture (USDA). I expected that based on the positions indicated by DOJ, up to that point, that DOJ would honor the subpoena, albeit by likely providing a privilege log, rather than the documents themselves.

The subpoena was issued to DOJ on February 7, 2006. It asked for the following records:

1. Other than the briefs filed in Heartwood v. U.S. Forest Service, 73 F. Sup.2d 962 (S.D. Ill. 1999), aff'd 230 F.3d 947 (7th Cir. 2000), all records that in any way relate to the possibility that the Categorical Exclusion adopted by the Forest Service on September 18, 1992 did not fully comport with the National Forest Management Act of 1976 (16 U.S.C. 472a, *et seq.*) or any other law.
2. All records that in anyway relate to the decision not to appeal the district court's decision in Heartwood.
3. All records that in any way refer to the validity of and/or whether or not to contest the scope of the nationwide injunction imposed by the district court in Heartwood.

DOJ accepted service. On March 6, 2006, close to the last day for response, DOJ issued a letter from Tom Clark, Attorney General for Natural Resources. In his letter, Mr. Clark contended that DOJ was not required, nor would it respond, to the subpoena, citing as authority 28 C.F.R. 16.26(a)(2) and what he characterized as the Touhy decision and rule. The code section cited by Mr. Clark deals with the internal processes of DOJ as to release of documents and deals with the role of the Attorney General and subordinates in deciding what is to be released and what is to be claimed as privileged. Mr. Clark closed his letter by asserting that if Appellant wanted the documents, it would have to proceed through FOIA or an APA proceeding.

On March 6, 2006, Appellant filed a Motion for Sanctions, asking that the Board take action against the FS for failure to comply with the Board's subpoena. Specifically, Appellant asked that the Board draw an adverse inference by finding "that the material sought by MVL establishes that the government's actions in suspending the Three Mile contract and continuing that suspension for a protracted period of time were both unreasonable and a breach of the contract." Appellant included attachments to the motion. Those attachments contained information which would support a conclusion that the FS knew during the Heartwood litigation and prior to award of the Three Mile contract that the FS lacked historical records supporting the adoption of the Categorical Exclusion, that such lack of records was understood by the FS to be one of the most damaging issues in defending the case, and that the FS knew that the lack of administrative records would significantly hinder defense of the FS position. By letter of March 7, 2006, to Appellant, the FS and DOJ, I invited the Appellant to respond to the legal arguments set out in DOJ's March 6 letter. Appellant

advised the Board that it wished to reply. On March 13, 2006, Appellant filed, Appellant's Response to the Department of Justice's Refusal to Comply with the Board's Subpoena to Attorney General Alberto R. Gonzalez and Statement of Practical Options for the Board. Additionally, the FS filed a response, that dated March 22, 2006.

In its response, the FS specifically declined to address the Board's authority to subpoena documents from DOJ or to address DOJ's authority to require Appellants to seek the requested documents through FOIA or a district court. Rather, the FS addressed solely the appropriate standard for issuance of the sanction of an adverse inference against the FS. As a threshold matter, the FS took the position that unless the Board holds that the "United States" is the party, it would be an abuse of discretion to sanction the FS for DOJ's action or failure to act.

Faced with the refusal of the DOJ to produce either the documents or a privilege log, the Board turned to Section 11 of the CDA, which provides in pertinent part:

In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

The wording of Section 11 does not allow a board to proceed on its own to a district court. Rather, the CDA is specific in requiring a board to proceed to the court through the Attorney General (AG). Recognizing the language and restriction of the Act, but of course, also recognizing that the board by going to the DOJ was essentially asking that entity to go to court against itself, I nevertheless submitted a letter dated April 25, 2006, to Attorney General Gonzales and to Mr. Kenneth L. Wainstein, U. S. Attorney for the District of Columbia, asking for them to file at the district court in order to enforce the subpoena. In choosing to go to the AG, I recognized that despite the obvious internal conflict, the AG nevertheless had the authority, if there was a conflict, to resolve it, assign a special attorney general or take other appropriate steps. The Board letter to the AG and U. S. Attorney identified the matters in issue, provided a brief history and stated that the documents requested were relevant to the issues before the Board. I also pointed out that I anticipated that if DOJ had any claims to privilege, those would be handled by DOJ through a privilege log. I then reviewed the prior dealings, including the letter from Mr. Clark and the reliance by DOJ, up to that time, on Touhy. I pointed out that the Touhy rule deals with housekeeping regulations of DOJ and does not vest DOJ with absolute authority to decide what documents it wishes to release and which it does not. I then cited the concurrence in Touhy by Justice Frankfurter, who made clear that an official such as the Attorney General may forbid his subordinates to release a document, but the matter of release, ultimately still remains subject to review by a court. More specifically, Justice Frankfurter stated,

To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to carry a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.

I then proceeded to point out that if the documents in issue were not reachable by the Board subpoena, then DOJ was obligated, under the CDA, to proceed with the application to the court (under Section 11 of the CDA), as requested by the Board. I pointed out that the blanket refusal, up to that point, by DOJ to produce either the documents or a privilege log, had DOJ being the ultimate decider as to the documents. I also noted that if conflict is a concern, the Attorney General could consider appointing an independent party to act as counsel for the Board for purposes of making the application contemplated by the CDA.

By letter dated April 25, 2006, the U.S. Attorney's office, through Rudolph Contreras, Chief, Civil Division, responded to the Board's request on behalf of both that office and the Attorney General. After first stating that DOJ understands that the Board has authority to issue subpoenas for production of documents pursuant to the CDA, 41 U.S.C. §601, and acknowledging that the procedure for enforcement of such subpoenas is set forth in 41 U.S.C. §601; Mr. Contreras stated that DOJ had concluded that the enforcement action requested would be inappropriate. In setting out DOJ's position, he stated, after citing some of the statutory language, the following:

In this connection, it is a long established rule of statutory construction that "the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude [the government]." Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989).

He continued, saying that when Congress passed the Contract Disputes Act in 1978, Congress thus acted subject to the well-known interpretation presumption that the federal government is excluded from the reach of statutes, like 41 U.S.C. § 610, that operate only with respect to a "person." He then acknowledged that the interpretive presumption "is, of course, not a hard and fast rule of exclusion," citing Cooper Corp., [312 U.S.] at 604-05, noting that it could be disregarded, only upon some affirmative showing of statutory intent to the contrary. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 781 (2000). He continued:

Courts may look to such sources as "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute" to discern "an intent, by the use of the term, to bring state or nation within the scope of the law," and thereby to "overcome . . . the presumption" that "person" does not include the government. Int'l Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 83-84 (1991) (internal quote omitted), quoted in Al Fayed, 229 F.3d at 272.

He then concluded, citing Al Fayed v. CIA, 229 F.3d 272 (D.C. Cir.2000) (where a different statute using the word “person” was found not to include third party government agencies), for the following:

Here as in Al Fayed, it does not appear that any of those sources demonstrates an intent to override the presumption for purposes of 41 U.S.C. § 610. Indeed, adherence to the presumption in interpreting this statute is the only way to avoid placing the Attorney General in the obviously paradoxical position of prosecuting an action that he would simultaneously be obligated to defend pursuant to 28 U.S.C. §516. Consequently, we do not believe that a subpoena enforcement against a federal agency is contemplated or permitted by 41 U.S.C. § 610.

Finally, he also addressed Touhy. He acknowledged that the Board was correct to point out that the Touhy regulations do not vest DOJ with absolute authority to decide what documents it wishes to release and which documents it does not. He then stated, however, that the Touhy regulations were not misapplied and then stated that a subpoena enforcement action on behalf of the Board is not the only way to enable an independent tribunal to determine whether the records were properly withheld. In that regard he restated an earlier DOJ argument that MVL could attempt to secure the documents under APA or FOIA.

Two points made in the above letter bear repeating. The first is that according to DOJ “person,” as used in the CDA, does not cover a federal agency. Given the blanket application set forth by DOJ, that means that the Board has no means of enforcing a subpoena through the court against any federal agency, including the contracting party. The second point, which follows from the first, is that in passing the CDA, Congress did not intend to give the boards a vehicle to enforce a subpoena against the Government but only against those involved in contracting with the government. Put another way, the Act contemplated that the government could secure documents through the Board by having a court enforce a Board subpoena, but contractors did not have that same due process right in regard to documents held by the Federal Government, but rather would have to seek enforcement by means of an APA or FOIA action.

It is noteworthy that the DOJ letter focuses on the term “person” and on the sentence dealing with enforcement of a subpoena. I will not here attempt to reconcile the language in the first sentence of Section 11 with the position of DOJ, other than to say that the first sentence dealing with subpoena plainly gives broad power, with no limitations as to party or entity. With that said, however, to accept the DOJ position would essentially make that broad power illusory against the government, which under DOJ’s reading simply could choose not to comply. Put another way, the lack of access to enforce a subpoena, essentially makes any Board subpoena against the Government illusory.

After receiving the letter from Mr. Contreras, the Board wrote to the Appellant and FS and advised each that they could file any comments on the letter. Both chose to respond.

Along with his filing, FS counsel provided additional information as to the documents and more particularly expressed the willingness of the FS to provide a log as to 10 of what had formerly been 19 disputed documents. In his Reply, at page (p.) 2, FS counsel states that in the Board's April 5, 2006, letter, the Board "suggested" that the FS consider the fact that DOJ was representing the FS in the Heartwood litigation and that, by implication, the FS may have control over some documents in DOJ's possession. Counsel for the FS then reported that accordingly USDA sought to have DOJ return all USDA generated documents that DOJ had found to be responsive to the subpoena and DOJ had now returned 10, of the 19 it had been holding. Counsel for the FS stated that the FS believed those documents are privileged. He continued that USDA does not object to a privilege log and provided a log, under separate cover. That was then done.

Turning to the focus of the FS reply, the FS asserts the Board should deny the Motion for Sanctions because:

1. The Board has not established that DOJ is a party to this appeal.
2. Even if DOJ is a party MVL has not met the Federal Circuit standard by showing that the documents withheld are "critical and controlling on the issue of liability" (in order to make that showing MVL must show that other available evidence does not allow it to make its case on liability) and that DOJ withheld the documents in bad faith.
3. The Forest Service has not violated any Order directed to it by the Board with regard to documents withheld by DOJ; and
4. The Board lacks jurisdiction to impose a monetary sanction against the government.

In the Appellant's response to the DOJ letter, it pointed out that the meaning of "person" was a matter of statutory interpretation and not a presumption; that DOJ had in past practice complied and had not challenged the Board right to subpoena; that other federal agencies have complied; challenged how DOJ and FS read "person;" and asserted that there is a different standard to be applied here, as the Government is acting in a commercial arena. Appellant also returned to argument it had made earlier, that because the Respondent is United States, the ongoing refusal to comply with discovery is sanctionable.

While the Board did not seek a reply from Mr. Clark to the new DOJ letter from Mr. Contreras, Mr. Clark submitted a letter dated May 23, 2006, stating that he had received a copy of the Board's May 3 letter and that DOJ was taking the opportunity to respectfully decline to provide additional comments.

DISCUSSION

The law lays out a reasonable process for dealing with how documents for which an entity claims privilege are handled. The process calls for preparation of a log, which identifies the document by date, subject, author and recipient. If there is a claimed privilege, it is so identified. That often ends the matter. However, if the opposition believes the document should not be privileged or should be released for some other reason, then it may move for the tribunal to direct that the document be released. The entity asserting privilege can defend its withholding. The tribunal will then rule on the basis of the information provided, or instead may choose to conduct an *in camera inspection*. The tribunal then decides whether to release the document. If the release is ordered or if it is denied, that could later be a basis of appeal.

In this proceeding, neither DOJ nor the FS have provided the Appellant nor Board with what the FS has now identified as 9 privileged documents (10 documents formerly in issue have been submitted via a privilege log from the FS and will be ruled upon separately) nor have either provided the Board with a privilege log. The documents are being withheld on the basis that the documents are not reachable due to a lack of subpoena enforcement authority in the CDA. DOJ recognizes that the documents are responsive to a discovery request.

Before moving on to the more substantive arguments, I note here that I find no support in the FS argument that the Board should end the matter now and accept DOJ at its word, that the documents are privileged. That would make DOJ the arbiter of the documents, instead of allowing a neutral entity such as the Board or district court to make that judgment. As to the alternative routes of FOIA and APA, suggested by DOJ and the FS, those are unacceptable and unnecessary alternatives. The CDA provides the Board with the authority and with a mechanism to assure compliance with a subpoena. A contractor, with a claim before the Board, has a right to expect the Board to invoke the enforcement process set out in the CDA, where appropriate; and not require the private litigant to seek documents outside of the Board process. Moreover, the test for an APA or FOIA court review differs from the review the Board would take for purposes of discovery.

ASSERTION THAT SINCE THE DOCUMENTS REMAINING WERE GENERATED BY DOJ, THEY ARE PER SE PRIVILEGED

The documents in issue may be privileged, if as contended by DOJ and the FS, they were generated as part of the litigation process by DOJ. It is recognized that DOJ was acting as the FS lawyer in the Heartwood environmental litigation. However, a board cannot determine privilege without the information normally included in a privilege log, for without that information, the Board has no basis upon which to assess the validity of the claimed privilege. The mere statement of a party or entity is not sufficient. For example, while I am reluctant to take on the role of identifying potential reasons for release of what might otherwise be a privileged document, an obvious example of where a log could be crucial would be a document which has been disclosed to multiple entities (including entities outside the FS and outside the scope of the litigation). Absent a privilege log, neither the

Appellant nor Board has a way of knowing who received the documents. Without a log, there is no way that the Appellant can effectively challenge a privilege claim as to a document on another basis.

ASSERTION THAT SECTION 11 DOES NOT COVER ENFORCEMENT AGAINST THE FEDERAL GOVERNMENT

Section 11 of the CDA provides:

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application by the board of contract appeals through the Attorney General . . . shall have jurisdiction to issue the person an order requiring him to appear before the agency board or member thereof, to produce evidence or to give testimony or both. . . .

DOJ focuses on the language, “In case of contumacy or refusal to obey a subpoena by a person. . .” DOJ asserts that the term “person” cannot apply to the United States, due to sovereign immunity. The FS and DOJ say that there is a legal presumption that “person” is not the United States. DOJ asserts that the claimed presumption must be followed, but then acknowledges that the use of the presumption is not a hard and fast rule, in all cases. DOJ acknowledges that the presumption is subject to statutory interpretation, but finds that such interpretation is not necessary in this case, saying instead that “it does not appear that any of the sources demonstrates an intent to override the presumption for purposes of 41 U.S.C. §610.”

Notwithstanding the assertion by DOJ that “person” in Section 11 of the CDA should be defined by use of the claimed presumption, it is evident, that the meaning of “person,” in the CDA, is a matter for statutory interpretation. See Linder v. Calero-Portocarrero, 251 F.3d 178, 180-82 (D.C. Cir. 2001) In Linder, the lower court had issued a ruling compelling the Defense Department, the State Department, and the CIA to comply with expanded subpoenas on the condition that the Linder’s pay “half the reasonable copying and labor costs.” (citations omitted). The lower court had based its ruling on the following language in FRCP 45 (c)(2)(B):

An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from inspection and copying commanded.

In Linder, the circuit asked the parties for oral argument as to whether sovereign immunity shielded federal agencies from third party subpoena under Rule 45 of the Federal Rules of Civil Procedure (FRCP). The court asked the parties to focus on the question of whether the United States was not

a “person,” as Rule 45 used the term, and therefore exempt from Rule 45 coverage. The impetus for the court action in Linder was a decision by the D.C. Circuit in Al Fayed v. CIA, 229 F.3d 272 (D.C. Cir. 2000), where the court raised questions as to the scope of Rule 45, standing alone as a basis to confer coverage over the federal government. Although the Linder court raised the issue, the court chose not to resolve the question it had posed as to the scope of Rule 45. That is because, the court concluded that the government had failed to raise the matter in the district court below, and therefore could not then belatedly raise the matter.

The Linder court, however, did discuss the meaning of “person” and some of that discussion is relevant to the inquiry before us here, as regards the MVL discovery dispute. In discussing the applicability of Rule 45 to the federal government, the Linder court stated,

Although our past decisions have assumed that person in Rule 45 included the federal government, we have never expressly so held and our assumption may need to be reexamined in light of Al Fayed.

Then, looking at Al Fayed, the court made its clear that it saw the holding in that case, as to the meaning of “person,” as used in 28 U.S.C. §1782 (the statute at issue in Al Fayed); to be a question of statutory interpretation. The statute in Al Fayed dealt with discovery directed at non-parties in the federal courts by parties to proceedings before foreign and international courts. Al Fayed was seeking discovery from the CIA in an action in a foreign court, relating to the death of his son and Princess Diana. The Al Fayed court stated there that there was a presumption that the term “person” in a statute does not include a sovereign, absent affirmative evidence of such inclusory intent. Id. at 274. Linder, in addressing the Al Fayed case, however, continued and said that the presumption is not a hard and fast rule of exclusion, citing Vermont Agency of Natural Resources v. United States, ex rel. Stevens, supra. Then turning to the facts in Al Fayed, the Linder court noted that in Al Fayed, there was no reason not to apply the presumption to 28 USC §1782, “particularly in light of the Dictionary Act, which defines statutory terms and governs the meaning of those words, ‘unless the context indicates otherwise.’ 1 USC 1.”

Continuing its discussion of the scope of Rule 45, the Linder court pointed out that in an earlier case, Houston Business Journal, Inc. v. Office of the Comptroller, 86 F.3d 1208, 1212 (D.C. Cir. 1996), it had stated that sovereign immunity did not insulate the federal government from complying with a Rule 45 subpoena, because in federal court, in 5 U.S.C. §702, the government has waived its sovereign immunity for actions, “seeking relief other than money damages.” More specifically the Linder court had said:

We too have determined that sovereign immunity is not a defense to third party subpoena. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) stated: Since at least 1965 this court has assumed the non-applicability of sovereign immunity to a non party subpoena directed at the government. “We found no cause to upset a steady course of precedent by attempting to graft onto discovery a broad doctrine of sovereign immunity.” Id. More recently, in Houston, we stated that sovereign immunity does not insulate the federal

government from complying with a Rule 45 subpoena, because in federal court the government has waived its sovereign immunity for actions, “seeking relief other than money damages.” in 5 U.S.C. § 702.

This case does not arise under 5 U.S.C. § 702. However, just as Congress did in 5 U.S.C. § 702, Congress similarly and specifically waived sovereign immunity for suits at the boards over government contract matters when it passed the CDA. That waiver of immunity specifically included the power to issue subpoenas and the mechanism to enforce them if necessary.

It is of interest that in the DOJ letter of April 25, 2006, where DOJ declines to file for enforcement at the court, DOJ posits that one should draw the inference that in drafting the CDA, Congress was well aware of the presumption that “person” did not include the federal government. That statement is not only overly broad and is provided without any backup or foundation, but additionally, attempts to re-write history. At least prior to 2000, the D.C. Circuit and others were uniformly applying the Rule 45 language (parallel language to the CDA subpoena language) to cover the federal government. That is reflected in the language in Linder, where the court said it had assumed and thus had been operating on the assumption that Rule 45 covered the government. Linder was issued in 2001. Accordingly, that means that when the CDA was passed in 1978, Congress, in choosing language in Section 11 that was similar to Rule 45, would logically have read the language as it was being understood and applied then. In 1978, “person” as used in the similar Rule 45 was understood to cover the federal government. The reading including the government is far more likely and logical than the theory of DOJ that Congress intended to exempt the sovereign. It was not until 2000 at the earliest, when Al Fayed, raised a doubt in the mind of the D.C. circuit court. Since the CDA was passed in 1978, we can assume, that absent clairvoyance, Congress was applying the language as it was understood at that time.

Linder and other cases establish that where there is no affirmative evidence as to the meaning or use of the term “person,” then the presumption will be used. However, if there is affirmative evidence that the government is not exempt, then the court will examine that evidence as a matter of statutory interpretation. The discussion as to timing, noted above, is only one indication of the intention of Congress to include the federal government.

The CDA was passed to provide a framework for resolution of contract disputes. Among the concerns at the time of passage was the fact that prior to the CDA, the boards did not have subpoena power, nor the power to compel witnesses. This concern was reflected in the comment to the Act at p. 31 which provided under Legislative History, Excerpts.

1. Senate Report

SUBPOENA, DISCOVERY AND DEPOSITION

Section 11 effectuates recommendation 3 of the Procurement Commission and gives boards of contract appeals of the agencies power to administer oaths, authorize depositions, and discovery, and issue subpoenas. It further provides a mechanism for enforcing these orders

through the courts. It is the intent of this increased authority to improve upon the quality of the board records, and to insure that the tools are available to make complete and accurate findings, thus minimizing the need for a court to supplement the board record on review.

2. House Report

In commenting on companion bills, the Comptroller General observed that the provision for discovery and subpoena powers will insure that tools to make complete and accurate findings will be available. He also stated that this will minimize the need for a court to supplement the board on review. In testimony before the subcommittee, the Department of Justice witness stated that the Department favors the investiture of contract appeals boards with subpoena and discovery powers.

While the above are not determinative on their own, what is helpful is the reference in the Senate Report to the report of the Procurement Commission. The Procurement Commission Report, at p. 3, addressed concerns about the lack of due process in the then existing system. It stated:

On the other side, the present system often fails to provide the procedural safeguards and other elements of due process that should be the right of litigants. Contractors are now forced to process most disputes through a system of agency boards of contract appeals, that while essentially independent and objective forums, do not possess the procedural authority or machinery to ensure that all the relevant facts and issues in complicated cases are brought before the boards and given adequate consideration. The boards lack adequate discovery and subpoena powers. . . .

The same report discusses at p. 16, the then existing jurisdictional split between administrative forums and the Courts, as to disputes arising under the contract (which were covered by boards) and those for which no contract clause granted relief (those going to the Court of Federal Claims). The Commission stated:

Some advantages in this distinction between types of disputes have been claimed. One is that claims for breach of contract tend to be characterized by complicated legal issues, are relatively costly and time consuming, and often are not confined to the particular items directly involved, but extend through the whole contract and even to the contractor's other work. In view of this, it has been argued that because the boards presently lack the power to subpoena and swear witnesses, compel discovery, and in general have less procedural safeguards than do courts, they are unsuited for handling such disputes.

Again the Commission was expressing concerns over the boards' lack of ability to secure documents from entities before it. No distinction was made between the federal government and contractors and if anything, the tone was aimed at providing contractors with the added due process. At p.21, under the subheading DISCOVERY AND SUBPOENA POWERS, the commission continued and said:

The quality of the board records would improve if the boards were given discovery and subpoena powers. This would ensure that the tools to make complete and accurate findings are available, and would minimize the need for a court to supplement the board record on review.

It is historical fact that the granting of subpoena power to the boards was generally supported by both government and industry. It was included to assure a more complete record and to provide procedural safeguards, which had not previously existed at the pre-CDA boards. The language of the Procurement Commission report indicates no preference being given, nor distinction made, as to subpoena authority over the contractor, the government or third parties. To conclude that Congress intended to exclude the government from the scope of the subpoena runs counter to the expressed desire to enhance due process for the parties and to expand the authority of the Board. Moreover, it is illogical that industry would have supported a bill that gave the Government this tool to get documents from the contractor and other third parties, but withheld that tool, if a contractor was seeking documents from the Government. It would be difficult to characterize a system which provided such an advantage to the Government to be an enhancement of due process.

Additionally, Section 8 (d) of the CDA provides that each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, “the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.” The clear intent of the language is to create at the boards, a parallel forum to the Court of Federal Claims, albeit not an identical forum for resolution of contract disputes. There are, of course, inherent differences between an administrative forum, such as the boards, and the Court of Federal Claims. However, it is clear from the CDA and its history, that Congress wished to provide the same level of remedy at the boards as at the court and part of that leveling was providing the boards with the power to issue and, if necessary, ultimately have their subpoena enforced. It is entirely inconsistent with the intention of Congress to provide parallel relief and at the same time limit the boards to enhanced subpoena power over a contractor, but without a similar power over the Government and its various agencies. Yet, that is the argument that is being put forth by DOJ. The FS has not provided any argument to the contrary.

At the time of passage of the CDA, the Court of Federal Claims already had subpoena power. Therefore, unlike the boards, Congress did not need to put separate statutory language into the Act regarding the right of the court to issue subpoenas nor did it need to address the mechanism involved in enforcing a subpoena.

The Court of Federal Claims operates under the Federal Rules of Civil Procedure. Its predecessor, the Claims Court, also operated under those rules in 1978. Those rules used the word “person,” when dealing with subpoena power, and as earlier addressed, the word “person” was assumed at that time, at least by the D.C. Circuit (see Al Fayed) and as far as I can tell other courts, to cover the

federal government. All the CDA did was take the same wording that was used at the Claims Court to cover all entities, including the federal government; and grant the boards similar jurisdiction.

DOJ has not made the argument that the Court of Federal Claims does not have subpoena authority against DOJ or other departments and executive agencies when dealing with the CDA. Yet, here DOJ and by extension, the FS (as part of the executive branch), want to treat the word “person” differently, when it comes to a board proceeding. The context of the Act and the intent to provide due process and to provide a parallel proceeding with the Court of Federal Claims, makes it clear that the CDA intended to give the board equal authority over subpoena, be it the government or a contractor. Any other reading is simply counter to the history and is illogical.

It makes no logical sense for Congress to have provided the boards with broad subpoena power in aid of resolving government contract disputes, while simultaneously intending to except all federal agencies known to possess directly relevant information from the process. If we accept the reading urged here by the Government, we are left with a circumstance, where USDA or any other department can force a party contractor or third party to provide documents and testify, by having the board go to the district court to enforce a valid subpoena; but, if the contractor wishes to bring in a government official who is not employed by USDA or some sister agency or wishes to secure documents from such a person or entity, the contractor has no similar tool.

Finally, the present position of DOJ is contrary to previous actions of DOJ. For example, DOJ complied with subpoenas issued by GSBCA regarding a GSA contract under which DOJ was to satisfy its requirements. Heritage Reporting Corp., GSBCA No. 10396, 91-2 BCA ¶ 23,845.

AUTHORITY FOR SANCTIONS

Case law reflects that boards of contract appeals have the inherent authority to impose sanctions. In appropriate cases, boards have drawn adverse inferences, because a litigant would not produce documents that were ordered to be produced by the board. In addition, Board Rule 33 specifically provides that if a “party” fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

The Corps of Engineers Board addressed the sanction authority of boards in J.V. Bailey Co., Inc., ENGBCA No. 5,348, 91-3 BCA ¶ 24,350. There that Board said:

Sanction powers of Boards of Contract Appeals traditionally have been recognized as the power of dismissal or other procedural limitations (e.g. restrictions on evidence which will be received on certain issues, prohibition of testimony by a witness, the drawing of adverse inferences) rather than imposition of monetary sanctions or other costs and fees. Turbomach, ASBCA No. 30,799, 87-2 BCA ¶ 19,756; Charles C. Razor dba Razor Trucking, PSBCA No. 569, 87-2 BCA ¶ 19,788.

Other boards have discussed the use of sanctions. In Hughes Aircraft, ASBCA No. 46,321, 97-1 BCA ¶ 28,972, the ASBCA noted that it had inherent power to impose sanctions for discovery

abuses and the authority to bar the introduction of evidence in extreme situations, where the circumstances warrant severe sanctions. Other cases support that the use of sanctions is inherent in the operation of a tribunal, such as, Arcon Pacific Contractors, ASBCA No. 25,057, 81-2 BCA ¶ 15,225; Integrity Management International Inc., ASBCA 18289, 75-1 BCA ¶ 11,235 (this case involves sanctions issued well before the passage of the CDA); Eagle Management, Inc., ASBCA No. 35,902, 90-1 BCA ¶ 22,513; Allied Reclaiming Services, AGBCA No. 2000-129-1 et. al., 00-2 BCA ¶ 31,028; Timber Rock Reforestation, AGBCA No. 96-108-1, 96-2 BCA ¶ 28,395; and Alisa Corporation, AGBCA No. 84-193-1, 86-3 BCA ¶ 19,139.

CAN THE FS BE SANCTIONED AS A CONSEQUENCE OF DOJ REFUSING TO PRODUCE DOCUMENTS

In her ruling, my predecessor, Judge Westbrook, stated that the United States was the party and as such, discovery imposed on the FS was discovery on the government. Accordingly, she concluded that the FS was responsible for securing the documents and if the documents were not produced, then the FS would be subject to whatever sanctions would be appropriate. Once assigned the case, I took a different tack, in that I concluded that the issue of whether the party was the United States, or the FS was essentially more an academic, rather than a practical issue to be resolved, given statements of DOJ counsel, which appeared to signal that DOJ would honor a board subpoena directed to it. Therefore, I chose to proceed by issuing a subpoena directly to DOJ. I expected that DOJ would comply, likely by providing a privilege log. I did not see that it would be in the interests of either the Government or MVL to engage in an academic fight over the matter of who was the party, particularly if there was a simpler way to get the documents. Frankly, I was surprised when DOJ refused to comply with the subpoena after indicating otherwise. DOJ's stated basis in initially refusing to honor the subpoena was what it characterized as the Touhy rule. At the point of DOJ's initial refusal to honor the subpoena, DOJ made no claim that the Board did not have subpoena authority over the federal government. It was not until I requested, on behalf of the Board, that DOJ make an application at the district court, as set out in Section 11, that DOJ, for the first time claimed that "person" as used in Section 11 did not cover the federal government and therefore the board could not enforce a subpoena, by applying to the district court, against any federal government agency.

In what FS counsel titles his sur-reply, counsel contends that the Board cannot sanction the FS in this case and again asserts that the FS has not failed or refused to obey an order issued by the Board. The FS reaches this conclusion on the basis that DOJ, and not the FS, has refused to comply with the Board directive. According to FS counsel, until and unless the Board concludes that the United States is a party, there has been no outstanding order directed to a party (the FS) and so, the Board cannot sanction the FS under Board Rule 33, by making adverse inferences. The FS states:

In the present posture of the appeal, the Forest Service has less ability to control DOJ's actions than do the Appellant (which can seek the documents through FOIA or in district court) or the Board (which can seek review by the Attorney General under the Contract Disputes Act). Accordingly, unless the Board holds that the

United States is the party, it would be an abuse of discretion to sanction the Forest Service for DOJ's action or failure to act.

In my view, the FS position turns the law on its head, and more importantly, it ignores the essential fact that both DOJ and USDA are part of the executive branch of Government. I need not provide the FS or DOJ with an organizational chart of the U.S. executive branch, other than to note the obvious; at the top of the pyramid is the President, to whom both DOJ and USDA are answerable. If there is genuine disagreement between DOJ and the FS (USDA), then it is incumbent on the executive branch to arrive at a single Government position, taking the dispute between the agencies, if there is one, as high as that requires. The fact that this appeal arises out of a USDA contract does not obviate the fact that ultimately there is a Government position. The Appellant is not, nor should it be, in a position where it has to resolve a dispute between sister federal agencies. That is the responsibility of the FS, USDA, DOJ and officers of the executive branch. If the executive branch chooses as a policy matter not to release the documents, then the consequences apply to the FS (and USDA), as they happen to be the Government entity that was signatory to the contract. The prejudice to Appellant will lie in a case involving those entities and it would be unfair to allow the FS to proceed with evidence and a position, while at the same time denying the Appellant its due process rights to secure documents relating to those issues. Although the FS has continued to contend that it is critical for the Board to decide whether the party is the U.S., rather than the FS, I find that even assuming that the FS is the party, that determination would not change the final result. The decision to release or not release the documents, is ultimately a decision of the executive branch.

Whether the FS agrees or does not agree as to the reading and actions of DOJ, the net result here is that the documents (or log) have not been produced. Given that the documents are held within the executive branch, the lack of direct possession by the FS does not in this instance create a shield. While cabinet departments may be equal and may generally act independently on various matters, that does not change the fundamental fact that they are each a subpart of the executive branch and therefore, absent some statutory prohibition, any conflicts in policy or procedure between departments can and commonly are resolved by higher levels within that branch. If the choice here is to not comply with the subpoena and thus take the position of DOJ, then the executive branch, through the FS, is subject to reasonable consequences.

For me to come to any other conclusion would be unfair to Appellant and undermine the due process for both parties, as mandated by Congress in the CDA. As I pointed out earlier in this Ruling, it was Congress' intent, in providing the boards with subpoena authority and in providing an enforcement mechanism, to provide the parties due process that had been lacking under the prior board practices. In establishing subpoena power at the boards, Congress made no distinction between Government and non-Government entities. Nothing in the CDA suggested that the documents or testimony to be compelled had to come from a signatory to the contract. Nothing in the CDA suggests that Congress intended due process for the Government but only partial due process for contractors. The CDA intended to provide a level playing field. If we accept the FS position in this case, which creates a shield for actions of sister Government agencies, we would undermine Congress' clear intent for equal treatment and create an advantage for the Government that is not available to contractors.

To make the point, I use the following comparison. If the Government had sought documents (relating to claimed costs) from an accountant of the prime through a subpoena, and the accountant, against the wishes of the prime, simply refused to provide the document or to testify (notwithstanding an enforcement action at the court); the Board would be expected and in fact almost certainly would draw adverse evidentiary inferences from that failure to provide documents and testify. In such an instance, the prime, absent some clause in its contract with the accountant, might have no way to otherwise force the accountant to testify or to provide documents. However, if documents were relevant and potentially critical, then the Board would in fairness have to draw adverse inferences, or otherwise the government would be prejudiced in its defense of the case.

Here, if we accede to the reasoning of the FS and DOJ, we have a similar situation, except instead, here we have two related Government entities. Here, DOJ had acted as the FS attorney in the environmental litigation and is believed to have documents relating to the reasonableness of the FS actions prior to award. DOJ has refused to provide those documents or even a log to the Board. Additionally, in this case, DOJ has further made it impossible for the Board to move forward with court enforcement, claiming the enforcement procedure, set out in the CDA, does not apply to the government. Even if, for purposes of this proceeding, we accepted the FS representation that the FS cannot force DOJ to give up the document (and as noted above, there is an ultimate executive authority), then the question still must be asked as to how can the Board give the FS a pass in this instance, without undermining the intended level playing field created by Congress.

The point is that the withholding of the documents or a log, prejudices the Appellant in this proceeding and does not allow it to exercise its full rights. To not sanction would allow the FS to continue to assert that it acted reasonably in its pre-award actions, while at the same time prevent Appellant from using documents which might well undermine that FS position. For me, as the presiding judge, to allow the matter to remain as a standoff, would be unfair to Appellant and violate what I see as the due process directive of the CDA. There is one executive branch. If DOJ does not comply with the subpoena, then sanctions against the FS are appropriate.

The FS states that it has not violated any Board order nor should it be held responsible for documents over which it has no control. The FS has also argued that under Board Rule 33, dealing with sanctions, the FS can only be held responsible if it violates a specific Board order. To the extent there has been no order directed at the FS, this Ruling constitutes such an Order. Moreover, the Board Rule addresses both failure and refusal to comply. Here, assuming that the FS and DOJ cannot internally resolve the issue and provide the documents or a log, then the FS has failed to comply. As noted above, I do not find that DOJ provides a shield.

Finally, I have reviewed the cases cited by the FS dealing with whether the client or attorney owns the work product privilege. The cases cited either deal with waiver or with the right of a law firm in Hobley v. Burge, 433 F.3d 946, 950 (7th Cir. 2006), to challenge a direction to produce, when the subpoena was only served on the client and not on the attorney. As to the discussion in Hobley regarding who controls the documents, I have already made clear that because the FS and DOJ are each part of the executive branch, the FS cannot use DOJ's actions as a shield, when the result would cause prejudice to Appellant.

REMEDY TOO HARSH AND CLAIMED NEED FOR BAD FAITH

The FS is incorrect in concluding that Appellant must show bad faith before it can justify imposition of sanctions. The FS relies on cases involving the destruction of evidence, which raise a number of questions unrelated to willful withholding, which is the situation here. More specifically, counsel contends that the remedy sought by Appellant is out of scope or proportion to the withholding of the disputed documents. FS counsel essentially relies on two cases, Slattery v. United States, 46 Fed. Cl. 402 (2000), and Eaton Corp. v. Appliance Valves Corp., 790 F. 2d 874, 878 (Fed. Cir. 1986). FS counsel argues that “it is odd” that MVL would have the Board more readily impose the harsh sanction of an adverse inference, where DOJ withheld documents under a claim of privilege, than had DOJ simply destroyed the documents. Counsel argues that the Board must apply the spoliation standard and that such standard at the Federal Circuit requires a finding of bad faith and a finding that the documents destroyed (or withheld) were critical or controlling on the issue of liability. Eaton Corp. v. Appliance Valves Corp. Counsel argues that if the circuit requires bad faith for destruction of documents, then it is not a valid use of the Board’s authority for the Board to use a lesser standard for the withholding, as is contemplated here.

The FS is correct that Slattery did involve withholding of documents. But otherwise, the facts in Slattery are so distinguishable, that Slattery is of no real assistance. First, Slattery did not involve the dishonoring of a subpoena. Instead, in that case, DOJ had asserted privilege for some documents, but had secured no protective order. On the other side, the plaintiff had never moved to compel the documents. At trial, the plaintiffs sought the documents and, in point of fact, they were ultimately given the documents by DOJ. However, notwithstanding the fact that the plaintiffs ultimately got the documents, the plaintiffs nevertheless sought an inference alleging spoliation. In addressing the arguments of the respective parties, the court made the statement, “Spoliation refers to the destruction or withholding of critically probative evidence, resulting in prejudice to the opposing party. See Hardwick Bros. Co. II v. United States, 36 Fed. Cl. 347, 416 (1996).”

The FS has latched on to the word “withholding” and has reasoned that the same standard must apply to withholding as to destruction. That is not the case. If one reads Slattery, it is clear that the court was not intending to make a legal holding that destruction and withholding of documents are equal and are to be treated the same. Rather, from a fair reading of Slattery, it is evident that the bad faith analysis discussed in Slattery is limited to cases where there are issues as to negligence or unintentional conduct, such as destruction. The cases cited in Slattery which deal with bad faith do not involve situations where the documents are actually available, but not be released.

This Board, as is the case with the Court of Federal Claims, is bound by decisions of the Federal Circuit. The Circuit case cited by the FS, Eaton Corp. v. Appliance Valves Corp., also does not provide support for the FS position. Eaton also involved destruction of documents. The term spoliation in Eaton applied solely to destruction and had nothing to do with withholding. Accordingly, because the issue was destruction, bad faith was considered. Documents can be destroyed by accident or by some other non-willful cause. Courts recognize that fact and cases involving destruction attempt to find a balance, between accidental and willful destruction, with courts being reluctant to impose stiff sanctions where the documents were made unavailable but not

on purpose. In contrast, here the documents are being voluntarily and wilfully withheld. The fact that DOJ and the FS believe the withholding is legally justified, does not change that fact. Bad faith and issues surrounding spoliation are simply not applicable to this case where the documents are available but will not be produced.

STANDARD OF LIABILITY AND FAILURE TO SHOW THAT INFORMATION IN DOCUMENTS WOULD BE CONTROLLING AND CRUCIAL

According to the FS, before imposing sanctions, the Board must find that the documents are critical and controlling, citing as authority Eaton. The FS continues that in order for the documents to meet the critical and controlling standard, the Board must first establish the standard for liability for breach of implied obligation to cooperate and not hinder. According to the FS, the Board has not done that and moreover, has implied that the obligation cannot apply to action that took place prior to award, including the preparation of environmental documentation. The FS argues therefore, that any DOJ evidence that relates to the legality of the pre-award environmental compliance, cannot be “critical or controlling” to MVL’s case and accordingly, the Board cannot impose the extreme sanction of drawing an adverse inference.

I recognize that if the documents sought related to matters that cannot support a claim, then the documents would not need to be produced. However, here the documents in issue may very well support the claim, as they deal with the reasonableness of government actions in the environmental process. Notwithstanding the FS contention to the contrary, the implied obligation to cooperate and not hinder performance can apply to environmental documentation and actions that were completed prior to award.

The Board has previously made clear that the implied obligation can apply to pre-award actions. In Shawn Montee, Inc., AGBCA Nos. 2003-132-1 et al., 04-2 BCA ¶ 32,564 and Motion for Reconsideration, AGBCA Nos. 2004-153-R et al., 04-2 BCA ¶ 32,755, the Board concluded that contract clause C6.01 (or similar CT 6.01) could be used by the FS, as a basis for suspension of a contract, even where the cause of the suspension was due to a pre-award error or wrongful action in performing environmental processing by the FS. Additionally, we also implicitly found that if the FS pre-award actions were found to be so unreasonable, then the clause could be defeated on the basis that the FS unduly hindered and failed to cooperate. We, in fact, said that much of the environmental disputes involved a question of degree as to whether the FS actions as to various environmental obligations were sufficient. Given the above and the fact that counsel for the FS is the same in both that case and this, there should be no confusion that unreasonable actions in fulfilling its environmental obligations could be a basis for the Board to find breach.

Subsequent to this Board’s decision in Shawn Montee, Inc., the Court of Federal Claims addressed similar issues in Trinity River Lumber Co. v. United States, USCFC Nos. 02-943C & 02-944C (consolidated) (June 20, 2005). Trinity relates to a suspension arising out of matters involved in Sierra Club v. Bosworth, 199 F. Supp. 2d 971 (N.D. Cal. 2002). In Trinity, Judge Bruggink conducted a thorough review of the law and concluded at p. 23, that, “These cases demonstrate that a breach of the implied duty to cooperate and not to hinder may be found where the government

causes delay by unreasonably prolonging timber contract suspensions or by unreasonably provoking the suspension of a contract. If such a breach causes harm to purchasers, the government may be found liable for damages. Judge Bruggink's wording, "provoking the suspension," covers pre-award actions. His conclusion is consistent with that of this Board in Shawn Montee.

Additionally, and particularly pertinent here, is the following from the Trinity opinion at p. 25:

On the other hand the Bosworth court found seven violations of NEPA and one violation of NFMA. Plaintiffs point out that the sheer number and type of violations suggest that the Forest Service acted unreasonably. At this point, it is sufficient to hold that such evidence is relevant. If the Forest Service had knowledge that its EIS was inadequate before it was issued, it would be unreasonable to award a timber sale contract in light of that risk that environmental groups would challenge the plan. In Trinity, the Court concluded that there was a gap in the evidence with respect to what the FS knew before it issued the EIS.

Under these circumstances, the better course would be to proceed to trial in order to obtain a full hearing of the material facts. At trial, the issue will be whether the Forest Service conducted itself "diligently and in good faith and whether it knew or should have known that its environmental assessment was inadequate when it awarded the contract. H.N. Wood Prods., 59 Fed. Cl. at 491.

Both Trinity and Shawn Montee, establish that pre-award actions can support a breach. The continued challenge to that proposition by the FS in the context of the ongoing discovery dispute is unwarranted. The cases and arguments put forth by the FS in the remainder of its briefing are essentially a legal re-argument of the scope of the duty and do not go to the issue of the matter of sanctions.

ABILITY TO WITHHOLD DOCUMENTS UNDER DOJ'S TOUHY INTERPRETATION

DOJ has not abandoned its claim that it is entitled to hold the documents under Touhy. The Touhy rule deals with housekeeping regulations of DOJ and more specifically 28 CFR 16.24, Subpart B, titled Production or Disclosure in Federal and State Proceedings. The regulation does not vest DOJ with absolute authority to decide what documents it wishes to release and which it does not. Even Mr. Contreras conceded that point in his letter. Rather, DOJ gets around that problem by suggesting that judicial review could be had under FOIA or APA review. DOJ sees no problem with it being the entity deciding where a litigant seeks relief.

The regulation relied on by DOJ is a housekeeping regulation, which controls how documents flow and are handled at that department. It does not negate the Board authority set out in the CDA.

The issue in Touhy involved the question of the right of a subordinate official of the DOJ to refuse to obey a subpoena duces tecum ordering production of papers of the Department in his possession. The refusal to provide the document was based upon a regulation, similar to the one in issue here,

that had been issued by the Attorney General. The petitioner was an inmate of the Illinois State penitentiary and his request brought into questions of waiver and also scope of the request. Among questions presented was whether it was permissible for the Attorney General to make conclusive determination not to produce records and whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena duces tecum. In deciding that the justice official properly refused to release the documents and that the DOJ order was valid, the court pointed out that it agreed with the determination of the Court of Appeals that since the holder of the documents was not questioned on his willingness to submit the material “to the court for determination as to its materiality to the case” and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material to this case.” The court never got to the question of whether the head of a department rather than a court could be the determinator of the admissibility of evidence. Thus, the majority decision in Touhy provides no support for the issue before us, which is the release to the tribunal, the Board.

What is, however, noteworthy is that while the majority did not address the specific issue, the matter was deemed sufficiently significant to be addressed by Justice Frankfurter in his concurring opinion. There he made it clear that an official such as the Attorney General may forbid his subordinates to release a document, but the matter of release, ultimately still remains subject to the court. More specifically, Justice Frankfurter stated,

To hold now that the Attorney General is empowered to forbid his subordinates, though within a court’s jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to carry a fox-hunting theory of justice that ought to make Bentham’s skeleton rattle.

Nothing in the Touhy decision provides an independent basis or support for DOJ not complying with the Board subpoena.

RULING AND ORDER

The subpoena issued to DOJ in this case is valid and enforceable under the CDA. The FS now has 14 days in which to either produce the documents or a privilege log. If it does not, then the Board panel will enter these sanctions. The Board will draw the adverse inferences that the evidence would show that the FS knew or should have known at the time of award that the FS actions during the environmental process (then subject to challenge in Heartwood) would likely not be sustained by the court and that the award was being made in the face of a likely suspension of the contract. Other evidentiary rulings and limitations may follow, depending upon development of the case.

I recognize the serious nature of the sanction and its likely affect. However, to allow the FS, in the face of the nondisclosure and evident prejudice to Appellant to provide evidence to the contrary, would leave Appellant with no relief, invalidate the authority of the Board to use its subpoena power and be counter to the intent of Congress to provide enhanced due process to both the Government and to contractors bringing actions at the boards.

HOWARD A. POLLACK

Administrative Judge

Issued at Washington, D.C.

July 18, 2006